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In The

Supreme Court of the United States

October Term, 1997

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,

Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a trial court abuse its discretion by subjecting to strict scrutiny a federally-authorized statute which does not penalize any fundamental right, and which merely limits a new resident's welfare benefits to the level of benefits received or receivable in the state of prior residence for a period of one year?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Eloise Anderson, Director, California Department of Social Services; California Department of Social Services; The Honorable Pete Wilson, Governor of the State of California; and Craig L. Brown, Director, California Department of Finance (hereafter, "California") respectfully request this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on January 28, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") in *Roe v. Anderson*, 134 F.3d 1400 (9th Cir. 1998) entered on January 28, 1998, is reproduced in the Appendix at A1. The order of the Ninth Circuit dated April 10, 1998, denying California's petition for rehearing is reproduced in the Appendix at A34. The order of the trial court granting plaintiffs' motion for preliminary injunction and referred to in the Ninth Circuit opinion is also reproduced in the Appendix at A13. *Roe v. Anderson*, 966 F. Supp. 977 (E.D. Cal. 1997).

JURISDICTION

On January 28, 1998, the Ninth Circuit issued its opinion affirming the decision of the United States District Court ("the trial court") that a California welfare statute operates as a penalty on the right to travel and

therefore must be subjected to strict scrutiny. This Court has jurisdiction to review, by way of writ of certiorari, the judgment or decree of the Ninth Circuit. 28 U.S.C. § 1254(1).

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, on February 13, 1998, California timely petitioned the Ninth Circuit for rehearing. On April 10, 1998, the petition for rehearing was summarily denied.

RELEVANT STATUTORY PROVISIONS

California Welfare and Institutions Code section 11450.03:

> (a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.
>
> (b) This section shall not become operative until the date of approval by the United States Secretary of Health and Human Services necessary to implement the provisions of this section so as to ensure the continued compliance of the state plan for the following:
>
> (1) Title IV of the federal Social Security Act (Subchapter 4 (commencing with Section 601) of Chapter 7 of Title 42 of the United States Code).

> (2) Title IX of the federal Social Security Act (Subchapter 19 (commencing with Section 1396) of Chapter 7 of Title 42 of the United States Code).
>
> (Added by Stats. 1992, c. 722 (S.B.485), § 37.5, eff. Sept. 15, 1992.)

42 United States Code section 604(c):

> A state operating a program funded under this part may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.

STATEMENT OF THE FACTS

Aid to Families with Dependent Children ("AFDC") has historically been California's largest welfare payments program.[1] In the most recent fiscal year for which actual expenditures were available (fiscal year 1995-1996),

[1] The federal AFDC program was repealed and replaced with a new program named Temporary Assistance to Needy Families ("TANF") as part of federal welfare reform. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, Title I, § 103(a)(1), Aug. 22, 1996, 110 Stat. 2112. On January 1, 1998, California's welfare program was renamed the California Work Opportunity and Responsibility to Kids Program, referred to as CalWORKs. California Welfare and Institutions Code sections 10063 and 11200. Because this change occurred so recently, this brief will continue to refer to the welfare benefits at issue as "AFDC benefits." The substitution of TANF and CalWORKs for the federal and state AFDC programs does not affect California's ability to implement the durational residency requirement at issue here.

California provided AFDC to an average of 2,645,814 persons per month, at an annual cost of $6 billion. Of that total amount, $2.9 billion came from the California state general fund. Declaration of Bruce Wagstaff, "Wagstaff Declaration," A36.[2]

Based on information provided by the United States Department of Health and Human Services for the fiscal year 1996-1997, California had the sixth highest grant level in the United States and the highest grant level of the 10 most populous states. Wagstaff Declaration, A36. Although California accounted for 29 percent of all money spent nationwide on the AFDC program, and 20 percent of the national AFDC caseload, it had only 12 percent of the nation's population. Wagstaff Declaration, A36-37.

In 1992, a time of continuing economic and fiscal problems in California, the state initiated a federally approved, time-limited experimental project to reform the mammoth AFDC program. Declaration of Dennis Hordyk, attached to Declaration of Theodore Garelis, "Garelis Declaration", and Garelis Declaration, A42 and 44. In conjunction with this experimental project, the California Legislature enacted in 1992, with strong bipartisan

[2] All evidentiary materials reproduced in the Appendix were presented to the trial court.

support, California Welfare and Institutions Code section 11450.03 ("section 11450.03").[3]

Section 11450.03 provides for a durational residency requirement for the provision of AFDC benefits. Under this statute, new California residents will receive for one year the same amount of AFDC benefits they received, or would have received, in their state of prior residence.

The experimental project referred to above included not only section 11450.03[4] but work incentive grant reductions, extension of the earnings disregard under which working AFDC recipients can keep more of their earnings without a corresponding reduction in benefits, and elimination of the 100-hour rule under which two-parent AFDC recipient families may remain eligible for benefits despite working more than 100 hours per month. *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994). In 1993, the California Legislature amended the experiment to add new and important elements to the reform effort: (1) an increase from $1,000 to $2,000 in the value of resources an

[3] Senate Bill 485, the precursor to section 11450.03, passed in the California Senate on a vote of 21 to 11. It passed in the California Assembly on a vote of 54 to 25. The Senate concurred in the Assembly amendments on a vote of 29 to 9. California Senate Final History 1991-1992, Regular Session, Volume I, pp. 381-382.

[4] The experimental project was terminated as of January 1, 1998, as a result of the replacement of the federal AFDC program by TANF and the enactment of the CalWORKs program. Section 11450.03 was removed from the experimental project in 1996. Its removal from that program was a condition of California's obtaining a renewed waiver of 42 U.S.C. section 1396a(c), the Medicaid Maintenance of Effort requirement. Garelis Declaration, A42 and Exhibit C thereto, A52.

AFDC family can possess and still qualify for benefits, Welf. & Inst. Code § 11155.1(a); (2) an increase in the allowable value of the recipient family's automobile from $2,000 to $4,500, Welf. & Inst. Code § 11155.1(a); (3) enhanced child care funding; and (4) the CalLearn Program, which is a $50 million program providing pregnant and parenting teens with cash bonuses for satisfactory school progress, intensive case management services, child care, and other supportive services, Welf. & Inst. Code § 11331, et seq.

In order to implement the experimental project, including section 11450.03, California obtained waivers of various provisions of federal statutes and regulations, including the Medicaid Maintenance of Effort requirement and various provisions of regulations at 45 Code of Federal Regulations sections 233.20(a)(1) and (2). Garelis Declaration, A42 and Exhibit B thereto, A47.

In response to a challenge on constitutional grounds to California's implementation of section 11450.03, the trial court issued a temporary restraining order on December 22, 1992, enjoining California from implementing the provisions of section 11450.03 pending a hearing on plaintiffs' request for a preliminary injunction. The preliminary injunction was issued by the trial court from the bench on January 28, 1993. *Green v. Anderson*, 811 F. Supp. 516, 523 (E.D. Cal. 1993).

California filed an appeal from the preliminary injunction. On April 29, 1994, the Ninth Circuit summarily affirmed the trial court's order granting the preliminary injunction. *Green v. Anderson*, 26 F.3d 95 (9th Cir.

1994). This Court subsequently granted California's petition for writ of certiorari. *Anderson v. Green*, 513 U.S. 922 (1994). Following briefing and oral argument, this Court held that no justiciable controversy was before it because the action in its then current posture was not ripe. *Anderson v. Green*, 513 U.S. 557 (1995). This was a result of the vacation by the Ninth Circuit of one of the waivers of federal law (the Medicaid Maintenance of Effort requirement) necessary for implementation of section 11450.03. *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994).

Subsequently, California requested a renewed waiver of the Medicaid Maintenance of Effort requirement from the Secretary of the United States Department of Health and Human Services. That renewed waiver was granted, but, at the same time, the Secretary retracted the waiver of federal authority necessary for implementation of section 11450.03. Garelis Declaration, A42 and Exhibit C thereto, A52.

As a result of Congressional efforts to redesign an out-of-date welfare system, on August 22, 1996, President Clinton signed the federal welfare reform bill, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 42 U.S.C. § 601, et seq. The federal AFDC program was repealed and replaced with a new program, Temporary Assistance to Needy Families ("TANF"). One of the major differences between the new TANF program and the old AFDC program is that under TANF, welfare benefits are no longer entitlements. 42 U.S.C. § 601(b). Additionally, as part of PRWORA, Congress specifically authorized states to enact durational residency requirements, such as section 11450.03, in their individual TANF plans. 42 U.S.C. § 604(c). The obvious

rationale for congressional authorization of durational residency requirements was to avoid the creation of country-wide welfare magnets in high benefit-level states. Congress thus protected states that use their block grants for high benefit levels from becoming "welfare magnets."

Pursuant to the authorization contained in PRWORA, on February 28, 1997, California once again instructed its counties to implement section 11450.03 beginning April 1, 1997. Plaintiffs then moved to block implementation of section 11450.03, by filing the underlying complaint for declaratory and injunctive relief ("the complaint") on April 1, 1997. Plaintiffs contended that section 11450.03 violated various provisions of the United States Constitution and the constitutional right to travel. A7-9.

The complaint named the California Department of Social Services, the directors of the California Departments of Social Services and Finance and the governor of the State of California as defendants. Plaintiffs are a class of California residents who have applied or will apply for benefits on or after April 1, 1997, and who have not resided in California for twelve consecutive months immediately preceding their application for aid. Jurisdiction was conferred on the District Court by 28 United States Code section 1343(a)(3). This suit was brought pursuant to 28 United States Code section 1983.

On April 1, 1997, the District Court granted plaintiffs' application for a temporary restraining order and enjoined implementation of section 11450.03 pending a hearing on plaintiffs' request for a preliminary injunction. A20. Plaintiffs' request for a preliminary injunction was

heard on May 16, 1997. A41. The District Court took the matter under submission and issued an order on June 4, 1997, granting the preliminary injunction. The District Court based its ruling on a finding that section 11450.03 penalizes the right to travel. *Roe v. Anderson*, 966 F. Supp. 977 (E.D. Cal. 1997); A13.

California appealed the order granting the preliminary injunction to the Ninth Circuit. On January 28, 1998, the Ninth Circuit issued an opinion affirming the order of the District Court. *Roe v. Anderson*, 134 F.3d 1400 (9th Cir. 1997); A1. The Ninth Circuit based its erroneous holding on its earlier opinion in *Green* that implementation of section 11450.03 penalizes the right to travel and thus should be subjected to a strict scrutiny standard of review. The Ninth Circuit also based its opinion on an incorrect statement of the standard of review for preliminary injunctive relief, departing from controlling precedent of this Court. A3, fn. 1. California sought rehearing only as to the incorrect standard of review, without waiving future review of other issues raised by the Ninth Circuit's opinion. On April 10, 1998, the Ninth Circuit summarily denied California's request for rehearing.[5]

Relying at least in part on the congressional authorization conferred by PRWORA, other states have enacted

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[5] California respectfully takes issue with the incorrect articulation of the standard of review by the Ninth Circuit. Despite the incorrect articulation of the standard of review, the Ninth Circuit acknowledged that an abuse of discretion will be found where the trial court "base[s] its ruling on an erroneous view of the law" A3, fn.1. As argued below, the trial court did base its ruling on an erroneous view of the law, thus abusing its discretion in granting the preliminary injunction.

similar durational residency requirements. These states include, among others, Rhode Island, *Westenfelder v. Ferguson*, C.A. No. 97-478L, 1998 U.S. Dist. Lexis 3621 (D. R.I. Mar. 18, 1998) (order granting preliminary injunction), *appeal docketed*, No. 98-1431 (1st Cir. May 14, 1998); Pennsylvania, *Maldonado v. Houstoun*, 177 F.R.D. 311 (E.D. Pa. Oct. 6, 1997) (order granting preliminary injunction), *appeal docketed*, No. 97-1893 (3rd Cir. Nov. 20, 1997); Minnesota, *Davis et al. v. Doth*, No. 62-C6-97-010231 (Minn. St. Dist. Ct. Dec. 5, 1997) (order granting temporary injunction); Washington, *Ruffin, et al. v. Quasim*, No. C97-5767 FDB (W.D. Wa. Feb. 6, 1998) (order granting preliminary injunction); and New Jersey, *Sanchez v. Department of Human Services*, No. A-000466-97T5 (N.J. Super. Ct. App. Div. filed Sept. 16, 1997).

REASONS FOR GRANTING THIS PETITION

Four years ago, this Court granted certiorari to consider the constitutionality of section 11450.03. *Anderson v. Green*, 513 U.S. 992 (1994). However, the merits of California's arguments were not addressed at that time because this Court held that no justiciable controversy existed because the matter in its then current posture was not ripe, due to the loss by California of a certain waiver of federal law necessary for implementation of section 11450.03. *Anderson v. Green*, 513 U.S. 557 (1995). Because both that provision of federal law and the AFDC program were repealed as part of PRWORA, the factual basis underlying this Court's determination in *Green* no longer exists. Apart from the preliminary injunction granted by the trial court, nothing now prevents California from

fully implementing section 11450.03. Therefore, this Court should now grant this petition to enable review of substantially the same question for which this Court granted certiorari in 1994.

A petition for writ of certiorari is granted by this Court "only for compelling reasons." Rule 10 of the United States Supreme Court. Review may be granted when a United States Court of Appeals has decided an "important question of federal law which has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.*

This Court has yet to decide and give guidance to the lower courts as to the correct standard of constitutional scrutiny of statutes which mandate that newcomers to a state continue to receive, for a limited period of time, the same level of benefits they would have received in their state of prior residence. As implicitly recognized by Congress, such statutes do not penalize the right to travel. Unlike other statutes addressed by this Court, California's durational residency requirement does not affect *eligibility* and does not create *permanent* distinctions between California residents. Instead, section 11450.03 merely affects benefit *levels* on a temporary basis. Under prior decisions of this Court, such statutes are customarily analyzed under the rational basis standard of review.

This Court should seize the opportunity to provide essential guidance to the states and lower courts on this important issue of constitutional law, and find that a

statute which does not penalize interstate travel should be subjected only to a rational basis analysis.

I.

REVIEW SHOULD BE GRANTED IN ORDER TO PROVIDE GUIDANCE TO THE STATES AND THE LOWER COURTS THAT A STATUTE WHICH DOES NOT PENALIZE TRAVEL SHOULD BE SUBJECTED ONLY TO A RATIONAL BASIS ANALYSIS

In an attempt to reform the welfare system of this country, the states have been experimenting with a variety of creative solutions to assist their indigent populations become independent of public assistance. One of the creative solutions which some states have adopted is a durational residency requirement. This particular solution has been authorized by Congress in PRWORA, the federal welfare reform act. 42 U.S.C. § 604(c).

However, the ability of the states to implement durational residency requirements has been stymied by the application of an incorrect standard of review when such statutes are challenged on constitutional grounds. In recent litigation, courts have relied upon *Shapiro v. Thompson*, 394 U.S. 619 (1969) and its progeny, and applied a strict scrutiny analysis, appropriate only when a fundamental right is penalized or a suspect class is impacted. However, the implementation of durational residency requirements penalizes no fundamental right and impacts no suspect class. Even so, the Ninth Circuit has assumed that durational residency requirements penalize a fundamental right, specifically, the right to travel. Although other trial courts have similarly held, a federal district court in Pennsylvania recently held that

Pennsylvania's durational residency requirement does not penalize the right to travel. Finding that *Shapiro* was not implicated by Pennsylvania's statute, the court therefore applied a rational basis standard of review to the statute. *Maldonado v. Houstoun*, 177 F.R.D. 311 (E.D. Pa. Oct. 6, 1997) (order granting preliminary injunction), *appeal docketed*, No. 97-1893 (3rd Cir. Nov. 20, 1997).

In its opinion affirming the trial court's order granting a preliminary injunction, the Ninth Circuit held that the trial court did not err in determining that plaintiffs had demonstrated a probability of success on the merits. The Ninth Circuit based its holding on its prior opinion, *Green v. Anderson*, 26 F.3d 95 (9th Cir 1994), summarily affirming the prior preliminary order enjoining implementation of section 11450.03. *Roe v. Anderson*, 134 F.3d 1400 (9th Cir 1997). The *Green* trial court had found that section 11450.03 penalized the right to travel and therefore should be subjected to a strict scrutiny analysis. *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993).

However, the Ninth Circuit erred on both occasions. Statutes, such as the one at issue here, with a primary focus on setting benefit levels, should be analyzed under the same rational basis standard to which public welfare assistance statutes are normally subjected. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

This repeated fundamental error of analysis prevents not just California, but many other states, from implementing creative, and constitutionally permissible, solutions to the question of welfare reform. In light of this

repeated error, and in light of the congressional authorization conferred by PRWORA, review by this Court is necessary.

II.

SECTION 11450.03 DOES NOT OPERATE AS A PENALTY ON TRAVEL AND THEREFORE SHOULD BE SCRUTINIZED ONLY UNDER A RATIONAL BASIS ANALYSIS

When a state distributes benefits unequally, the distinctions it makes are subject to review under the Equal Protection Clause of the Fourteenth Amendment. The statutory scheme must pass the rationality test at a minimum. *Zobel v. Williams*, 457 U.S. 55, 60 (1982). Generally, a law will survive such scrutiny if the distinction rationally furthers a legitimate state purpose. A rational basis analysis is the appropriate constitutional review for statutes involving the administration of public welfare assistance. *Dandridge*, 397 U.S. at 485.

The trial court and the Ninth Circuit relied upon *Shapiro*, and its progeny, in holding that section 11450.03 should be subjected to a strict scrutiny analysis. In *Shapiro*, this Court held that legislation which denied welfare assistance outright to new state residents of less than one-year duration was constitutionally impermissible because, as such legislation "touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." *Shapiro*, 394 U.S. at 638.

To characterize *Shapiro* as barring implementation of section 11450.03 is totally unjustified, as this Court has left just such a question open in that case. In a footnote, this Court indicated:

> We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

394 U.S. at 638, n. 21.

Thus, in *Shapiro*, this Court determined only that the complete denial of welfare assistance for a full year penalized the plaintiffs' right of interstate movement. This Court did *not* determine that any durational residency requirement, no matter how carefully crafted, penalizes the right to travel.

This Court refined its analysis of legislation affecting the right to travel in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 258-259 (1974). There, this Court stated that *Shapiro* "stand[s] for the proposition that a classification which 'operates to *penalize* those persons . . . who have exercised their constitutional right of interstate migration,' must be justified by a compelling state interest," 415 U.S. at 258, but repeated its prior statement in *Shapiro*, that "some 'waiting period[s] . . . may not be penalties.' " *Id.* at 258-259.

In both *Shapiro* and *Memorial Hospital*, the plaintiffs' right to travel was penalized because they were put in a

worse position by application of the statutes at issue after they moved to their new states. In *Shapiro*, the plaintiffs had a right to receive welfare assistance in their state of prior residence. After moving, they were no longer eligible for welfare assistance for a full year. In *Memorial Hospital*, the plaintiffs had a right to state-funded, non-emergency medical care before they moved. After they moved to Arizona, they were not eligible for non-emergency medical care for a period of twelve months. Thus, in both cases, the plaintiffs lost their eligibility for public assistance due solely to their moving to a new state. As a result, this Court determined that their right to travel had been penalized.

California's ability to implement section 11450.03 is unaffected by the holdings of *Shapiro* and *Memorial Hospital*. Unlike the plaintiffs in *Shapiro* and *Memorial Hospital*, plaintiffs here have not lost any *eligibility* to public assistance they enjoyed in their state of prior residence. California has no waiting period to establish *eligibility*. California does not deny plaintiffs the ability to travel to California. Section 11450.03 thus does not penalize the right to travel.[6]

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[6] Plaintiffs essentially argue that without the guarantee of a certain benefit level, they cannot move to California. They are, therefore, arguing that California is constitutionally obligated to fund their move. No other newcomers to California have the ability to demand a certain payment level upon their decision to move to a new home – nor should they. As a general matter, a state is under no duty to subsidize the costs of the exercise of constitutional rights. In *Harris v. McRae*, 448 U.S. 297, 317-318 (1980), this Court held that a woman's freedom of choice does not carry with it a constitutional entitlement to the financial resources necessary to exercise that freedom. Here, California has not prohibited travel or placed a substantial obstacle in the way of a newcomer's move to California; it has simply limited welfare benefit levels for recent California residents to no more than they received or would have received in their state of prior residence. New residents are free to travel to California, and AFDC benefits remain available for recent California residents.

Citing *Zobel v. Williams*, 457 U.S. 55 (1982), the trial court determined that the relevant comparison is not between newcomers to California and residents of other states, but between newcomers and existing California residents. However, the right to travel of existing residents is not even potentially impacted by section 11450.03. If section 11450.03 does impact the right to travel, then that impact is caused by the decision to travel and should therefore be judged by its effect on persons who have traveled, or who may potentially travel, to California and not by a comparison involving existing California residents. Because only residents who have recently traveled to California are subject to the provisions of section 11450.03, the relevant constitutional inquiry is whether those recently arrived residents suffer a detriment due to a decision to travel to California. To determine whether such a detriment exists, one must compare the position of newcomers before and after travel to California.

Here, plaintiffs have no change in their position and will suffer no detriment, as to receipt of AFDC benefits upon moving to California. Plaintiffs will receive AFDC benefits in the same amount they received, or would have received, in their state of prior residence. As such, they suffer no detriment and are not penalized by moving to California.

To compare recent arrivals with longer-term California residents for the purpose of analyzing the existence of a penalty on the right to travel is to compare apples to oranges. As noted above, longer-term California residents are, by definition, not impacted by section 11450.03 since any decision to travel to California has already been made. Therefore, such a comparison does not involve questions of travel. Such a comparison is, instead, purely a question of benefit levels and must be reviewed under a rational basis analysis. *Dandridge*, 397 U.S. at 485.

That section 11450.03 does not penalize the right to travel is consistent with *Zobel*. There, income from oil reserves was distributed by Alaska to its residents based upon length of state residency, thus creating *permanent* classifications. This Court in *Zobel* stated, 457 U.S. at 58, that the Alaska statute is quite unlike the durational residency requirements examined in *Shapiro* and *Memorial Hospital*. Because this Court concluded in *Zobel* that the Alaska statute lacked a rational basis, the Court did not engage in an analysis of whether the Alaska statute triggered strict scrutiny due to its impact on travel. Therefore, *Zobel* did not compel the lower courts to engage in the fiction of determining whether newcomers have been penalized by section 11450.03 by comparing newcomers with existing residents.[7]

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[7] Plaintiffs argue that because California's cost of living is generally higher than elsewhere, the benefits provided for by section 11450.03 operate as a penalty on new residents. This argument assumes, however, that the benefits received in the prior state of residence bear some rational relationship to the standard of need or the cost of living in that state and that the cost of living in the California community to which plaintiffs have moved is in fact higher than in their state of prior residence. This assumption is wrong as there is no requirement for benefit levels to be related to anything other than budgetary constraints. Under the former AFDC program, many states had constitutionally adequate benefit levels much lower than the standard of need. *King v. Smith*, 392 U.S. 309, 334 (1968); *Dandridge v. Williams*, 397 U.S. 471, 480 (1970). The states have "undisputed power" under the Social Security Act "to set [both] the level of benefits and the standard of need" in the AFDC program. *King*, 392 U.S. at 334; *Jefferson v. Hackney*, 406 U.S. 535, 541, 545 (1972). This power of the states to set benefit levels is even less subject to dispute under TANF than under AFDC, as the benefits at issue are no longer entitlements. 42 U.S.C. § 601(b).

Nor are plaintiffs handicapped by the creation of *permanent* distinctions among residents and newcomers as were the plaintiffs in *Zobel*, *State Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), and *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). The statute at issue in *Attorney General of New York v. Soto-Lopez* determined eligibility for veterans' preferences for civil service based upon state residency at the time of induction into the armed forces. Similarly, the statute at issue in *Hooper v. Bernalillo County Assessor* determined eligibility for a property tax exemption based upon residency before a specific date. Persons subject to section 11450.03 do not have their *eligibility* for AFDC benefits determined upon California residency.

Section 11450.03 does not affect eligibility. All persons subject to the provisions of section 11450.03 have been determined to be eligible for benefits in California. Unlike plaintiffs in *Shapiro*, *Memorial Hospital*, *Hooper*, and *Soto-Lopez*, plaintiffs here are not foreclosed from AFDC

benefits under section 11450.03. Only the level of AFDC benefits plaintiffs will receive is affected by section 11450.03. Yet it is clear that statutes involving the administration of public welfare assistance (including the setting of benefit levels) are analyzed under a rational basis standard. *Dandridge v. Williams*, 397 U.S. 471 (1970). Plaintiffs have not shown how a change in benefit levels implemented under a durational residency requirement differs from other statutes involving the administration of public welfare assistance.

Under plaintiffs' theory, any difference in the level of any government service or benefit between states (or even a difference in laws pertaining to social, economic or domestic spheres) arguably impacts the decision to travel to another state, and could therefore penalize the right to travel. This argument, of course, leads to absurd results. States do not, and do not have to, maintain either similar welfare benefit levels,[8] *Dandridge*, 397 U.S. at 480, or, for that matter, similar requirements relating to domestic relations, *Sosna v. Iowa*, 419 U.S. 393 (1975). Simply put, each state has its own distinct laws impacting the life of its residents, both old and new. Differences between states, even though at times major, do not penalize the right to travel. There is no constitutional guarantee that a move to a new state will come without differences.

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[8] If plaintiffs' argument were valid, it would then be unconstitutional for each state to maintain its own unique benefit level. Any state with a lower grant level than another state would be constitutionally required to raise its grant level, so as not to impact the right to travel.

Thus, because section 11450.03 does not operate as a penalty on the right to travel to California, the lower courts erred in determining that section 11450.03 should be subjected to strict scrutiny. Thus, review should be granted by this Court to address an important question of federal law that has not been, but should be, settled by this Court in order to provide guidance to the states and the lower courts.

CONCLUSION

Review should be granted by this Court to decide an important question of federal law that has not been, but should be, settled by this Court.

The recent Congressional authorization of durational residency requirements renders it imperative for the states and the lower courts to be clear as to the correct standard of constitutional review. An incorrect formulation of the standard of constitutional review puts inappropriate and unnecessary road blocks in the path of states pursuing congressionally-mandated welfare reform.

Section 11450.03 has been narrowly tailored to adjust AFDC benefit levels without penalizing the right to travel. To maintain that section 11450.03 "penalizes" the right to travel by neutralizing only one factor in a person's decision to move to California is an act of pure legal fiction. As shown above, newcomers to California are not prevented from traveling to California by section 11450.03. Section 11450.03 simply recognizes the fact that

California is not obligated to fund the exercise of a constitutional right.

For these reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellees,* v. ELOISE ANDERSON, Director of the California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; CRAIG BROWN, Director of the California Department of Finance, *Defendants-Appellants.*	No. 97-16326 D.C. No. CIV-S-97-0559 DFL/JFM OPINION

Appeal from the United States District Court
for the Eastern District of California
Honorable David F. Levi, District Judge, Presiding

Argued and Submitted
December 11, 1997 – San Francisco, California

Filed January 28, 1998

Before: Betty B. Fletcher and Thomas G. Nelson,
Circuit Judges, and Robert H. Whaley,* District Judge.

* Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

Opinion by Judge Fletcher

COUNSEL

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Mark Rosenbaum, ACLU of Southern California, for the plaintiffs-appellees.

OPINION

FLETCHER, Circuit Judge:

The State of California appeals the grant of a preliminary injunction to Brenda Roe, Anna Doe, and a certified class of all others similarly situated, who brought an equal protection claim under 42 U.S.C. § 1983 to prevent California from implementing Welfare and Institutions Code § 11450.03. That statute limits benefits to new residents in California for their first year of residency to the amount that they received under the Aid to Families with Dependent Children (AFDC) program in their state of prior residence. We affirm.

I.

We review on appeal the grant of a preliminary injunction. We have repeatedly instructed that

> to obtain a preliminary injunction, the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips in its favor. These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.

United States v. Nutri-cology, Inc., 982 F.2d 394, 397 (9th Cir. 1992) (citations and internal quotation marks omitted). The grant of a preliminary injunction is reviewed for abuse of discretion,[1] and that discretion is abused where

[1] A district court's order regarding preliminary injunctive relief is subject only to "limited review." The grant or denial of a preliminary injunction will be reversed "only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996) (citing *Miller v. California Pac. Med. Ctr.*, 19 F.3d 449, 455 (9th Cir. 1994) (en banc)).

Although we have previously suggested that issues of law underlying the district court's decision on the preliminary injunction are reviewed de novo, *Metro Publishing, Ltd. v. San Jose Mercury News*, 987 F.2d 637, 640 (9th Cir. 1993), the Supreme Court has expressly rejected any multi-tiered standard of review for abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (Rule 11). "Rather, an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.*

This single-tier formulation of the abuse of discretion standard of review has been subsequently adopted in numerous other contexts. *See, e.g., Koon v. United States*, 116 S. Ct. 2035, 2047-48 (1996) (sentencing guidelines); *Schlup v. Delo*, 513 U.S. 298, 333 (1995) (fundamental miscarriage of justice exception in capital habeas) (O'Connor, J., concurring); *United States v. Morales*, 108 F.3d 1031, 1035 (9th Cir. 1997) (expert testimony); *Osorio v. INS*, 99 F.3d 928, 932 (9th Cir. 1996) (grant of asylum); *Flores v. Shalala*, 49 F.3d 562, 567 (9th Cir. 1995) (attorney's fees); *Stock West Corp. v. Taylor*, 964 F.2d 912, 918 (9th Cir. 1992) (comity and abstention in determining tribal court jurisdiction).

the district court "based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

Thus, we review only the district court's consideration of the likelihood of success on the merits at one end of the scale, and the possibility of irreparable harm at the other end of the scale. We do not decide the merits. *See L.A. Mem'l Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1198 (9th Cir. 1980) (declining to reach the merits on review of the grant of preliminary injunction although "strenuously urged by the parties").

A.

While neither party suggests that the district court applied the wrong preliminary injunction standard, California argues on appeal that the district court misapprehended the law with respect to the underlying issues of equal protection and the fundamental right to travel. As a result, California argues that the district court erred in its determination of plaintiffs' probability of success on the merits.

1.

Section 11450.03 of the California Welfare and Institutions Code, enacted in 1992, provides that "families that have resided in this state for less than 12 months" and who qualify for welfare shall receive benefits no greater than the "maximum aid payment that would have been

received by that family from the state of prior residence."[2] Under this provision, new California residents from lower-benefits states would receive that lower level of benefits throughout the first year of their residency in California.

California first sought to implement this durational residency requirement in 1992, pursuant to the grant of relevant waivers by the Secretary of Health and Human Services. However, the district court judge, the same

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[2] Section 11450.03 states in full:

(a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

(b) This section shall not become operative until the date of approval by the United States Secretary of Health and Human Services necessary to implement the provisions of this section so as to ensure the continued compliance of the state plan for the following:

(1) Title IV of the federal Social Security Act (Subchapter 4 (commencing with Section 601) of Chapter 7 of Title 42 of the United States Code).

(2) Title IX of the federal Social Security Act (Subchapter 19 (commencing with Section 1396) of Chapter 7 of Title 42 of the United States Code). (added by Stats. 1992, c. 722 (S.B.485), § 37.5, eff. Sept. 15, 1992).

judge that presided in the instant case, granted a preliminary injunction at that time against implementation of § 11450.03 after determining that the distinction among California residents based on the duration of their residency was unconstitutional. The district court relied on a line of Supreme Court cases addressing durational residency provisions in a variety of contexts. *See Green v. Anderson*, 811 F. Supp. 516, 518-23 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *vacated as unripe*, 513 U.S. 557 (1995).[3]

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[3] The Supreme Court, after granting *certiorari*, vacated as unripe the district court's decision (summarily affirmed by this court) granting the preliminary injunction against implementation of § 11450.03 due to intervening litigation that struck the necessary grant of waivers from the Secretary of Health and Human Services. *See Beno v. Shalala*, 30 F.3d 1057, 1076 (9th Cir. 1994). Because § 11450.03, by its own terms, was no longer applicable, the Supreme Court determined that "[t]he parties have no live dispute now, and whether one will arise in the future is conjectural." *Anderson v. Green*, 513 U.S. 557, 559 (1995). As a result, the Court decided that "[v]acatur is appropriate, therefore, to 'clea[r] the path for future relitigation of the issues between the parties and [to] eliminat[e] a judgment, review of which was prevented through happenstance.' " *Id.* at 560 (citation omitted).

In February 1996, the Secretary again granted waivers for most of California's welfare program, but expressly withheld the waiver that would have permitted California to implement the residency requirement. Nevertheless, in August 1996, Congress enacted a new federal welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 42 U.S.C. §§ 601, et seq., that specifically authorized the states to apply a durational residency requirement of the type found in § 11450.03 to those who have "resided in the State for less than twelve months" without additional waivers. The PRWORA superceded [sic] the AFDC

Brenda Roe and Anna Doe, different plaintiffs than those in *Green v. Anderson*, commenced the instant action on April 1, 1997, each having recently moved to California seeking employment and being eligible for assistance. They argued that, due to the higher cost of living in California, the relatively lower level of assistance established by § 11450.03 threatened them with imminent deprivation of the basic necessities of life. That same day, the district court entered a temporary restraining order enjoining implementation of § 11450.03, pending a hearing on plaintiffs' request for a preliminary injunction, and granting plaintiffs' motion to proceed under fictitious names. On April 23, 1997, on the stipulation of the parties, the district court permitted the instant action to be maintained as a class action.[4]

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program with a new program entitled Temporary Assistance to Need Families ("TANF") that significantly increased the states' discretion to design their federally supported welfare plans without seeking waivers from the Secretary. *See* 42 U.S.C. § 604(c).

In October 1996, California submitted its welfare plan to the Department of Health and Human Services, including a durational residency limitation consistent with § 604(c). On February 28, 1997, in All-County Letter 97-11, the California Department of Social Services instructed the counties to implement § 11450.03 as of April 1, 1997.

[4] The district court certified the class of plaintiffs defined as "all present and future AFDC and TANF applicants and recipients who have applied or will apply for AFDC or TANF benefits on or after April 1, 1997, and who will be denied full benefits because they have not resided in California for twelve consecutive months immediately preceding their application for aid."

Finding that the plaintiffs demonstrated the possibility of irreparable harm and that California would not be unduly harmed, the district court on June 4, 1997, granted the preliminary injunction, citing its prior reasoning in *Green v. Anderson* regarding the probability of success on the merits. *Roe v. Anderson*, 966 F. Supp. 977 (E.D. Cal. 1997).

2.

In granting the preliminary injunction in the instant case, the district court adopted by reference its prior discussion in *Green v. Anderson* of the Supreme Court's cases regarding the right of migration and equal protection, in which the Court set aside as unconstitutional distinctions drawn among residents of a state – all of whom are bona fide residents – based on the incipiency or duration of their residency.

California challenges the district court's reliance on its earlier decision in *Green*. Although the decision in *Green* was summarily affirmed by this court, *see* 26 F.3d 95, 96 (9th Cir. 1994), that judgment is not binding precedent because the Supreme Court ultimately vacated it as unripe. *See Anderson v. Green*, 513 U.S. 557, 559-60 (1995). California further suggests that the analysis in *Green* is outdated because of the subsequent enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 42 U.S.C. §§ 601 et seq., which authorizes durational residency requirements as part of a broad-based federal legislative welfare reform effort.

However, our prior affirmance of the district court's decision in *Green* remains viable as persuasive authority, notwithstanding the Supreme Court's vacatur. *See In re Taffi*, 68 F.3d 306, 310 (9th Cir. 1995) (following as persuasive authority a decision vacated by the Supreme Court on other grounds); *Orhorhaghe v. INS*, 38 F.3d 488, 493 n.4 (9th Cir. 1994) (following as persuasive authority a decision vacated by the Supreme Court as moot). Moreover, the passage of the PRWORA does not affect the constitutional analysis of § 11450.03 because, as the Supreme Court has explained, "Congress may not authorize the States to violate the Equal Protection Clause." *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969).

3.

In finding that Roe and Doe had demonstrated a probability of success on the merits, the district court determined that the apparent purpose of § 11450.03 was to deter migration of poor people to California. The district court noted in *Green* that California's "two-tier system" for AFDC benefits implicates the constitutional right to freedom of travel or migration,[5] which " 'protects not only physical movement, and forbids direct restraints on interstate migration, but also protects residents of a State from being disadvantaged, or from being treated

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[5] While acknowledging that "the right to travel is not protected by explicit provision in the Constitution," the district court noted that "the Supreme Court repeatedly has held that such a right inheres in the concept of a union." 811 F. Supp. at 518; *see also id.* at 518 n.7 (string cite).

differently, simply because of the timing of their migration, from other similarly situated residents.' " *Green*, 811 F. Supp. at 518 (quoting *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 905 (1986)). At oral argument before this court, in response to the suggestion that the purpose of § 11450.03 is to keep poor people out of the state, the state conceded that it does not want people to move to California "with a mind-set of economic dependency."

We are thus satisfied, based upon the persuasive authority of our prior affirmance in *Green v. Anderson* and the apparent purpose of § 11450.03, that the district court did not err in its determination that Roe and Doe demonstrated a probability of success on the merits.

B.

"Numerous cases have held that reductions in AFDC benefits, even reductions of a relatively small magnitude, impose irreparable harm on recipient families." *Beno v. Shalala*, 30 F.3d 1057, 1063-64 n.10 (9th Cir. 1994) (string cite). The district court specifically found that the two "named" plaintiffs demonstrated that they faced the possibility of irreparable harm if the injunction were not issued because they both "have been unable to locate housing in California that they could afford on the reduced grant. Others within the class may face lower benefit levels depending on the state of prior residence." 966 F. Supp. at 985.

Nevertheless, California argues that, because the AFDC grant for new California residents "remains the same as it was in their state of prior residence . . . they

suffer no harm cognizable by this Court." As such, California suggests that the proper comparison is between the "position of newcomers before and after travel to California," rather than between "recent arrivals" and "longer-term California residents."

However, as noted by the district court, in case after case the Supreme Court has determined that the appropriate comparison is between the treatment of recent residents of California and other residents of California and not a comparison of recent residents of California to residents of other states. *See Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 904 (1986) (holding that the State may not treat new residents differently, "because of the timing of their migration, from other similarly situated residents"); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623 (1985) ("The State may not favor established residents over new residents."); *Zobel v. Williams*, 457 U.S. 55, 58-59 (1982) (comparing positions of new and older Alaska residents in receiving a bounty from oil revenues). The district court did not err in finding that plaintiffs faced the possibility of irreparable harm. California does not argue on appeal that it would be unduly harmed by the preliminary injunction.

II.

Balancing the probability of success on the merits with the possibility of irreparable harm, we hold that the district court did not abuse its discretion in granting the preliminary injunction. Our prior affirmance in *Green* remains persuasive as to the probability of success on the merits, and as to the possibility that irreparable harm

falls on the class Roe and Doe represent, but not on California.

An appeal from the grant or denial of a permanent, rather than preliminary, injunction would entitle the parties to a full review on the merits. We reject California's invitation to engage in such a review of this case in its current posture, before the district court has had a chance to address the underlying merits upon a fully developed record.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRENDA ROE and ANNA DOE, on behalf of themselves and all other similarly situated, Plaintiffs, v. ELOISE ANDERSON, Director of the California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; CRAIG BROWN, Director of the California Department of Finance, Defendants.	No. CIV-S-97-0529 DFL MEMORANDUM OF OPINION AND ORDER (Filed Jun. 4, 1997)

This case again presents the question of the constitutionality of a one-year durational residency requirement for full welfare benefits. A California statute, enacted in 1992, provides that "families that have resided in this state for less than 12 months" and who qualify for welfare shall receive benefits no greater than the "maximum aid payment that would have been received by that family from the state of prior residence." Cal. Welf. & Inst. Code § 11450.03.[1] Under this provision, California

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[1] Section 11450.03 of the Welfare and Institutions Code provides:

residents who have migrated to California from states that provide a lower level of benefits than California would receive that lower level of benefits through the first year of their residency in California. The State first sought to implement this residency limitation in 1992. At that time, the court found that such a distinction among California residents, based on the duration of their residency, was unconstitutional under a line of Supreme Court cases addressing durational residency provisions in a variety of contexts. *See Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *vacated as unripe sub nom Anderson v. Green*, 513 U.S. 557, 115 S. Ct. 1059 (1995). Because the controlling legal principles and precedents

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(a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

(b) This section shall not become operative until the date of approval by the United States Secretary of Health and Human Services necessary to implement the provisions of this section so as to ensure the continued compliance of the state plan for the following:

(1) Title IV of the federal Social Security Act (Subchapter 4 (commencing with Section 601) of Chapter 7 of Title 42 of the United States Code.)
(2) Title IX [sic] of the federal Social Security Act (Subchapter 19 (commencing with section 1396) of Chapter 7 of Title 42 of the United States Code.)

have remained unchanged, the court reaches the same conclusion and again finds that § 11450.03 makes an unconstitutional distinction between California residents based on the length of their residency.

I.

Section 11450.03 was enacted in 1992 in conjunction with a California experimental work incentive project under the Aid to Families with Dependent Children ("AFDC") program. Section 11450.03 is only effective upon approval by the Secretary of Health and Human Services. Approval was given by the Secretary, in the form of a waiver, in October 1992.[2] The court entered an injunction prohibiting implementation of § 11450.03 on January 28, 1993. *Green*, 811 F. Supp. at 523. Subsequently, in a parallel litigation that challenged the Secretary's grant of waivers needed for the California welfare experiment – including the waiver for the durational residency limitation – the Court of Appeals vacated the Secretary's waivers. *See Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994). By its own terms, § 11450.03 then ceased to apply in the absence of approval by the Secretary. Accordingly, having granted California's petition for certiorari in *Green v. Anderson*, the Supreme Court found that the constitutionality of § 11450.03 no longer presented a justiciable controversy. *Green v. Anderson*, 513 U.S. 557, ___, 115 S. Ct. 1059, 1060 (1995).

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[2] The waiver authority, dated October 29, 1992, states that the Secretary waives the requirements in 42 U.S.C. § 602(a) and "various provisions of the regulations at 45 CFR 233.20(a)(1) and (2)." Pls.' Ex. 2 at 9.

In February 1996, the Secretary again granted the necessary waivers for the California welfare experiment with the exception of the waiver permitting the State to distinguish between old and new residents. The Secretary expressly declined to renew this waiver,[3] and without the waiver § 11450.03 was a dead letter. There the matter stood until August 1996 when Congress enacted a new federal welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 42 U.S.C. §§ 601, et seq. The PRWORA significantly increased the states' discretion to design their federally supported welfare plans without seeking waivers from the Secretary. The Act superseded the AFDC program with a new program entitled Temporary Assistance to

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[3] The Secretary's refusal to grant a waiver for a residency requirement reflected her view that a two-tier benefits system was unconstitutional. Plaintiffs in this action have submitted a copy of the Secretary's brief filed May 17, 1995, in *V.C. v. Whitburn*, Civil Action No. 94-C-1028, an action brought in the United States District Court for the Eastern District of Wisconsin. Schwartz Decl. Ex. A. The Wisconsin AFDC demonstration project at issue applied to four counties only, for the first six months of a new arrival's residency in those counties, and would pay AFDC benefits at the level of the new resident's state of prior residence whether or not that level was higher or lower than the otherwise applicable Wisconsin level AFDC benefits. In her brief, the Secretary took the position that the Wisconsin project was unconstitutional under existing Supreme Court precedent. Nonetheless, the Secretary stated that she would continue the waiver previously granted to Wisconsin so that Supreme Court review would not be prevented as it had been in *Green*.

Needy Families ("TANF").[4] The Act specifically authorized the states to apply a one-year durational residency requirement of the kind embodied in Cal. Welf. & Inst. Code § 11450.03. *See* 42 U.S.C. § 604(c).[5] In October 1996 the State of California submitted its TANF plan to the United States Department of Health and Human Services. The plan included a durational residency limitation consistent with California law and § 604(c). On February 28, 1997, in All-County Letter 97-11, the California Department of Social Services instructed the counties to implement § 11450.03 as of April 1, 1997. Pls.' Ex. 3.

The implementation instructions in the All-County Letter explain that to be eligible for AFDC at the California computed grant amount, one member of the "assistance unit" must have resided in California for twelve consecutive months. *Id.* at 25. Thus, even if family members had lived in California all of their lives, but left the State "on January 29th, intending to reside in another state, and returned on April 15th," the family would receive AFDC at the level of the state of residence from January 29 to April 15, if that level were lower than the

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[4] Although there has been a change of terminology in federal law, the State continues to refer to the relevant benefits for needy families as "AFDC" benefits.

[5] The PRWORA provides:

> A State operating a program funded under this part may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.

42 U.S.C. § 604(c) (Supp. 1997).

benefits that California would otherwise provide to the family. *Id.* at 30. Similarly, if "children from another state move in with an unaided caretaker relative who is a California resident," the level of benefits of the children's state of prior residence would determine their benefits for the first year of their residence in California.[6] *Id.* Nor would the birth of a newborn be treated differently because "neither the newborn nor any other member of the [assistance unit] has lived in California for 12 consecutive months." *Id.* at 32. In the computation examples, the instructions use a family of two – mother and one child – who move to California from Arizona. In California, region 1, the AFDC payment would be $456 a month compared to the Arizona payment of $275. Until the family has resided in California for twelve consecutive months, the family will receive AFDC benefits of $275. *Id.* at 33. And this lower amount will be the benefit level for the first year of residency whether or not the family actually was on welfare in the state of prior residence; the instructions note that "[i]t does not matter if a family was on aid in the former state." *Id.* at 30. On the other hand, the instructions explain that the residency requirement does not apply to families who have moved to California from another country because such countries would not have an AFDC program on which to base a comparison of benefit levels. Thus, a new state resident from one of the fifty states could receive a lower benefit than a new resident from a foreign country.

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[6] The instructions suggest that the unaided caretaker relative might be able to avoid this outcome by requesting aid for him or herself, thus creating a new assistance unit to which the children could be added. *See id.* at 31.

This action was filed on April 1, 1997, by plaintiffs Brenda Roe and Anna Doe. Brenda Roe was a resident of Oklahoma until early 1997. When her husband lost her job, the Roes decided to move to California to pursue employment. Ms. Roe was six months pregnant as of April 8, 1997. Ms. Roe states that because of complications that developed in her pregnancy after their move to California, Mr. Roe cannot leave her unattended and therefore cannot work. Ms. Roe was informed by the State social services office that she would be limited to the Oklahoma monthly grant level of $307 when she became eligible for AFDC at the six-month point of her pregnancy as compared to the California grant level of $565. According to Ms. Roe, the monthly rents in the community in which they now reside, Long Beach, California, are $300 for a studio apartment and $450 to $650 for a one-bedroom apartment. Ms. Roe avers that at the time she and her husband decided to move to California she did not know anything about AFDC or TANF and had never been on welfare.

Anna Doe recently moved to Los Angeles County from Washington, D.C. At the time of her move she was pregnant. She states that she came to California to look for a better job. According to her declaration, she obtained a job when she first arrived in California but later stopped working because she found the job too stressful. She has been living in a shelter. She became eligible for AFDC in April 1997 at the six-month point of her pregnancy. Under the two-tier system, her grant would be limited to $330 per month, the Washington, D.C. level as opposed to $456 per month, the California AFDC benefit for a single parent residing in Los Angeles

County. According to Ms. Doe, the rents for apartments in her area range from $450 to $570 a month.

On April 1, 1997, a temporary restraining order was entered by the court enjoining implementation of § 11450.03.[7] The parties stipulated that the temporary restraining order would remain in effect until resolution of plaintiffs' motion for preliminary injunction. On April 23, 1997, on the stipulation of the parties, the court permitted the action to be maintained as a class action and certified a class of plaintiffs defined as "all present and future AFDC and TANF applicants and recipients who have applied or will apply for AFDC or TANF on or after April 1, 1997, and who will be denied full California AFDC or TANF benefits because they have not resided in California for twelve consecutive months immediately preceding their application for aid." Plaintiffs now move for a preliminary injunction prohibiting defendants from implementing the durational residency requirement in § 11450.03.[8]

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[7] The temporary restraining order was issued by the Honorable Lawrence K. Karlton. Judge Karlton also granted plaintiffs' motion to proceed under fictitious names.

[8] On April 15, 1997, the court certified to the United States Attorney General that plaintiffs in this action have drawn into question the constitutionality of § 404(c) of Title IV of the Social Security Act as added by § 103 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2214 and codified at 42 U.S.C. § 604(c). The United States was permitted the opportunity to file an amicus brief but did not do so nor did it seek to intervene. Defendants' contention that the United States is an indispensable party is without merit. Section 604(c) permits, but does not require, the states to include a durational residency

II.

Plaintiffs make a number of factual contentions about the effect of § 11450.03 and the characteristics of the population of new residents that are relevant to their motion. As to the effect of § 11450.03, plaintiffs' exhibits demonstrate that the disparity between the California level and the level of the other forty-nine states will vary a good deal depending on the state of prior residence. For example, a four-member family in Los Angeles would receive a monthly AFDC benefit of $673, but if the family recently moved from Mississippi – which provides the lowest benefit level for a family of four of all of the states – the monthly benefit would be limited to $144. The cost of living in the various states may also affect a comparison of the relative benefit levels. According to the declaration of Robert Greenstein,[9] filed by plaintiffs, when housing costs are factored in, California benefit payments rank 18th in the nation. Greenstein Decl. ¶ 28; tbl. 1. Thus, although in absolute terms California benefit levels rank as the sixth highest grant level in the United States, *see id.* ¶ 29, Mr. Greenstein concludes that "[b]ecause

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requirement in their state plans. The durational residency provision challenged here is imposed by State, not federal, law. *See Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) (finding that a federal provision prohibiting Secretary from approving a state welfare plan that included a residency requirement of more than one year not at issue in challenge brought against state residency requirements).

[9] Mr. Greenstein is Executive Director of the Center on Budget and Policy Priorities in Washington, D.C., and is the past administrator of the federal Food and Nutrition Service. Greenstein Decl. ¶¶ 1,2.

California's housing costs are high relative to most states and because welfare families in California are less likely than welfare families in any other state[ ] to live in subsidized housing, the residency requirement will place many recently arrived welfare families on an inferior footing relative to welfare families in the state from which the newcomers moved."[10] *Id.* ¶ 29.

Finally, on the question of the disparity between the AFDC grants of new and old California residents, plaintiffs offer that the disparity likely will increase under the PRWORA. The new welfare legislation permits the states to use federal funds for purposes other than cash assistance, such as to create new programs or to provide assistance not in the form of a cash grant. Thus, states may reduce their cash grants, while increasing other services, but it would be the lower cash grant that California would look to in calculating benefits for the first year of residency in California. Furthermore, because the new federal law eliminates the requirement that the states maintain a single

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[10] According to plaintiffs, expert:

> In all but two of the 45 states (including the District of Columbia as a state) in which welfare benefits are lower than in California, the average statewide costs of modest housing also are lower than in California. This means that newly entered residents from 43 of these 45 states typically will face higher costs of living, but they will not receive welfare benefits that reflect or adjust for those higher costs. . . . In fact, there are 15 states in which the maximum AFDC benefit for a family [of] three was less than half the Fair Market Rent for even a one-bedroom apartment in California.

Id. ¶¶ 29, 30.

statewide system, plaintiffs predict that in some of the states benefit levels may vary from county to county, increasing the possible variation and disparity.[11]

As to the characteristics of the population of new residents, plaintiffs make the case that persons do not move from state to state to seek higher AFDC benefits. According to the declaration of Professor Joel F. Handler,[12] the "welfare magnet" hypothesis is incorrect. Indeed, Professor Handler suggests that "non-AFDC-eligible people were more likely to move to higher benefit states than AFDC-eligible people . . . – exactly the opposite of the correlation that would be predicted by a 'welfare magnet' effect."[13] Handler Decl. ¶ 10. Professor

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[11] Plaintiffs also contend that the lack of uniformity under the new welfare law will make monitoring other states' programs untenable and will lead to mistakes. *See id.* ¶¶ 17-22.

[12] Professor Handler is the Richard C. Maxwell Professor of Law at UCLA Law School and UCLA School of Public Policy and Social Research. Handler Decl. ¶ 1.

[13] As to the welfare magnet hypothesis, Professor Handler states:

> An important study (Levine and Zimmerman, 1996) of the alleged "welfare magnet" hypothesis found a distinct absence of empirical support for the proposition that AFDC recipients tend to move from lower to higher benefit states, or to remain in higher benefit states. . . . The study found that only 3.8 percent of the AFDC-eligible population moved from one state to another, and only 1.8 percent moved from a state offering lower to a state offer[ing] higher AFDC benefits. In contrast, out of AFDC non-eligible people, 6.8 percent moved to a different state, 3.4 percent from a lower to a higher benefit state.

Id. ¶ 10.

Handler also states "that less than half of the AFDC-eligible population that moved to a higher-benefit state actually went on welfare within the first two years of their move." *Id.* Plaintiffs also submit the declaration Professor John Hartman.[14] Professor Hartman undertakes a review of the relevant statistical studies and performs his own analysis of the data he considers most reliable. Professor Hartman concludes that "welfare benefits appear to exert *no impact* on the residential choices made by poor people. And, when the indigent relocate, they have *no greater propensity* to consume welfare benefits than the poor who are already within a state's borders."[15] Hartman Decl. ¶ 49 (emphasis in original).

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[14] Professor Hartman is an Assistant Professor of Sociology at Columbia University who specializes in social science statistics. Hartman Decl. ¶ 1.

[15] Plaintiffs also offer Mr. Greenstein's opinion that many families "move with no expectation of receiving welfare benefits." Greenstein Decl. ¶ 6. Mr. Greenstein bases this opinion on data showing that less than half, 42 percent, of recently arrived California AFDC recipients, for whom there is data, had received welfare benefits in the state of their former residence. *Id.*

Professor Hartman's finding that the poor who migrate to a state are no more likely to go on welfare than the poor who are longer term residents would be important were the court to apply the Privileges and Immunities Clause of Article IV, under the approach suggested by Justice O'Connor in her concurring opinion in *Zobel v. Williams*, 457 U.S. 55, 71-81 (1982) (O'Connor, J., concurring). Under this approach, the constitutionality of a provision depends in part on whether non-citizens "constitute a peculiar source of the evil at which the statute is aimed" *Id.* at 76 (citation omitted).

Although not taking direct issue with most of plaintiffs' factual contentions, defendants provide a number of qualifications. On the question of disparity in benefits, defendants note that the lower benefit level that new residents experience may be offset in part by supplementary benefit programs, such as homeless assistance, that California provides to the needy without respect to the length of their residency. In addition, new residents would receive full Medicaid benefits and food stamps and in fact would receive an additional dollar of food stamp benefits for every three dollars of reduction in their AFDC grant. Wagstaff Decl. ¶ 8. Notwithstanding these additional ameliorating facts, defendants do not disagree with plaintiffs' contention that there will be disparities, even significant disparities, among California AFDC recipients as between newcomers and recipients who have resided in the state for one year. Indeed, defendants could hardly argue otherwise given defendants' position that the overriding purpose of § 11450.03 is to limit California's welfare expenditures. Defs.' Opp. at 25.

On the question of the "welfare magnet" hypothesis, defendants submit no declarations but briefly discuss a study published by the Brookings Institution that concludes that the poor do move to states with higher benefit levels. This study is criticized by Professor Hartman and the critique is a telling one that goes unanswered. Although defendants do not concede that the "welfare magnet" hypothesis is invalid, it is apparent from their pleadings that defendants do not view the hypothesis as critical to the constitutionality of the residency requirement. Rather, defendants' argument is a straightforward one that does not depend on empirical support: the State

of California spends an enormous sum of money each year on AFDC, some $2.9 billion; the State has the right and the duty to control the expense of the AFDC program in any way that it can; § 11450.03 by reducing the payments to new residents will save the State some $10.9 million in the 1997-1998 fiscal year and therefore is an appropriate exercise of State budgetary authority so long as the residency requirement does not amount to a penalty on migration under *Shapiro v. Thompson*, 394 U.S. 618 (1969), and the cases following *Shapiro*. The State defendants contend that § 11450.03 is not unconstitutional under *Shapiro* because new residents receive the same level of cash benefits as they would have received in the state of their prior residency.

III.

In *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1990), the court previously reviewed the relevant Supreme Court case law and concluded that the two-tier system under § 11450.03 was unconstitutional. In a subsequent case presenting much the same issue, the Supreme Court of Minnesota reached the same conclusion as to a similar provision in Minnesota law. *See Mitchell v. Steffen*, 504 N.W.2d 198 (1993), *cert. denied*, 510 U.S. 1081 (1994). There have been no developments in the case law that would question the analysis in *Green* or *Mitchell*.[16] The court will

[16] In an article reviewing the case law concerning state distinctions based on the duration or onset of residency, Professor William Cohen of the Stanford Law School notes that as to the dispute presented in this case, the make up of the Supreme Court has changed since its last decision in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) such that "[i]t is less than clear with whom the Supreme Court, as presently constituted, will agree." William Cohen, *Discrimination Against New State Citizens: An Update*, 11 Const. Commentary 73, 78 (1994). However accurate this observation, it is not proper for a lower court to attempt to anticipate new developments or refinements in the Supreme Court's approach to an area based on a change in the make up of the Court. Professor Cohen also suggests that "[t]hese should be easy cases." *Id.* In Professor Cohen's view, under the Citizenship Clause of the Fourteenth Amendment, "it is unconstitutional to deny benefits to new citizens that are extended to other citizens similarly situated – subject only to reasonable assurances that claims of new residence are bona fide." *Id.* at 79.

not repeat but now adopts its discussion in *Green* of the Supreme Court's right of migration and equal protection cases in which the Court set aside as unconstitutional distinctions drawn among residents of a state – all of whom are bona fide residents – based on the incipiency or duration of their residency. As the Supreme Court stated in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 904 (1986), the right of migration "protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents." The Supreme Court has found such distinctions invalid in the context of welfare benefits, *Shapiro v. Thompson*, 394 U.S. 618 (1969), nonemergency medical care, *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974), the right to vote, *Dunn v. Blumstein*, 405 U.S 330 (1972), rebates from state oil revenues, *Zobel v. Williams*, 457 U.S. 55 (1982), and veteran preferences, *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) and *Attorney General of New York v.*

Soto-Lopez, 476 U.S. 898 (1986). *See also Williams v. Vermont*, 472 U.S. 14 (1985) (tax credits). The Court has only upheld such distinctions where there was a genuine question as to whether the new residents were bona fide residents of the State, a concern that is not present in this case. *See Sosna v. Iowa*, 419 U.S. 393 (1975) (divorce); *Starns v. Malkerson*, 401 U.S. 985 (1971), *summarily aff'g* 326 F. Supp. 234 (Minn. 1970) (three-judge court) (in-state tuition).

The central analytical dispute here is whether the appropriate comparison is between new residents of California and the residents of their former states or between new residents and other longer term residents of California. The State defendants argue that so long as the benefit provided to new residents of California is the same as that provided to residents of their former states, there is no penalty on migration and no violation of equal protection.[17] Plaintiffs contend that the appropriate comparison

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[17] There is a logical inconsistency between defendants' argument and the structure of § 11450.03. Unlike the two-tier Wisconsin project described in note 3 *supra*, § 11450.03 only provides the same benefit level as the state of prior residency if that level is below that of California. Thus, if the new resident comes from a state with a more generous benefit, the resident will not receive the same treatment as in the state of prior residents [sic]. At oral argument, counsel for defendants argued that it would make little sense for the State to ever pay more to new residents, than to longer term residents, since the whole purpose is to save money.

The State defendants do not contend that there is anything about welfare that uniquely would justify a distinction between old and new residents. At oral argument counsel acknowledged that under the defendants' analytical approach, any State

is among California residents, some of whom are new arrivals and others of whom have been in the State for a longer period, and that no significant distinctions can be drawn among bona fide residents based on the length or onset of their residency in California.

The Supreme Court has resolved the question of which groups to compare. In case after case, the Court has determined that the appropriate comparison is among recent residents to California and other residents of California and not to residents of other states.[18] The Court explained in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623 (1985), that "[t]he State may not favor established residents over new residents" and in *Soto-Lopez* that the State may not treat new residents differently, "because of the timing of their migration, from other similarly situated residents." *Soto-Lopez*, 476 U.S. at 904. Moreover, the decision in *Zobel v. Williams*, 457 U.S. 55 (1982), rests entirely on a comparison of new and older

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service, benefit or, indeed, tax or other imposition, keyed to the level of the new resident's former state would be constitutional. Thus, for example, a state could assess new residents at the higher tax rate of the state of their former residence. *But cf. Zobel v. Williams*, 457 U.S. 55, 58 n. 2 (1982) (noting that the Alaska Supreme Court had set aside under the Alaska Constitution's equal protection clause a provision giving tax exemptions to residents based on the length of their residency in the State).

[18] *See Mitchell v. Steffen*, 504 N.W.2d 198, 201-202 (1993) ("The United States Supreme Court has ruled that the comparison, in our case, is to be made between recent residents to Minnesota and other Minnesota residents, not between recent Minnesota residents and residents of other states. The Court has made this abundantly clear."), *cert. denied*, 510 U.S. 1081 (1994).

Alaska residents, each of whom received a bounty from oil revenues that no other state provided to its residents.

The court acknowledges that the states have broad latitude to design benefit programs. Moreover, both the Congress and the State of California, and several other states, consider that it is an appropriate cost saving measure to limit the benefits of new residents to those they would have received in the state of their prior residence. Facing a similar congressional permission in *Shapiro*, however, the Supreme Court held that "Congress may not authorize the States to violate the Equal Protection Clause." 394 U.S. at 641. In light of established Supreme Court precedent, the distinction drawn by § 11450.03 between new and old residents of California must be found unconstitutional.

IV.

Plaintiffs demonstrate that they face the possibility of irreparable injury if the injunction is not issued.[19] Both of the named plaintiffs have been unable to locate housing in California that they could afford on the reduced grant. Others within the class may face lower benefit levels depending on the state of their prior residence. Although

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[19] A party requesting a preliminary injunction must show either a likelihood of success on the merits and the possibility of irreparable injury or that serious questions on the merits are presented and the balance of hardships tips sharply in the party's favor. *Johnson Controls, Inc. v. Phoenix Control Systems, Inc.*, 886 F.2d 1173, 1174 (9th Cir. 1989). The court employs a sliding scale that takes account of the strength of plaintiff's showing on the merits and on injury.

any disruption to a State program is of concern, the record as it now stands does not suggest that the State will be unduly harmed by the issuance of an injunction. The record does not support a finding that there will be an influx of poor persons to California because of California's benefit levels. Moreover, the State may save a comparable amount of money by a very minor reduction in the benefits paid to all AFDC recipients.[20]

Plaintiffs' motion for preliminary injunction is therefore granted. The court orders:

Pending judgment in this action, defendants and their agents, assignees, and successors in interest are enjoined from implementing: 1) Section 11450.03(a) of the California Welfare and Institutions Code; 2) regulations promulgated pursuant to § 11450.03(a) of the California Welfare and Institutions Code, including but not limited to M.P.P. E.A.S. § 89-110.4; and 3) All-County Letter ("ACL") 97-11 to the extent that the ACL denies standard California AFDC or TANF benefits to members of the plaintiff class or determines any AFDC or TANF benefits in whole or in part by reference to the AFDC or TANF grant of any other state or territory.

IT IS SO ORDERED.

Dated: 2 June 1997.

/s/ David F. Levi
DAVID F. LEVI
United States District Judge

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[20] At oral argument, plaintiffs' counsel stated that a reduction of some 36 cents a month would produce a yearly aggregate saving of $10 million.

DECLARATION OF SERVICE

Case Name: **ROE v. ANDERSON, et al.**

USDC, Eastern District of Cal. Case No.: CIV-S-97-0529 DFJ/JFM

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On *July 2, 1997,* I placed the attached

CIVIL APPEALS DOCKETING STATEMENT

in the internal mail collection system at the Office of the Attorney General, 1300 I Street, P.O. Box 944255, Sacramento, California, 94244-2550, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage fully postpaid, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on July 2, 1997, at Sacramento, California.

/s/ Diane Boggess
Diane Boggess

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees, v. ELOISE ANDERSON, Director of the California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; CRAIG BROWN, Director of the California Department of Finance, Defendants-Appellants.	No. 97-16326 D.C. No. CIV-S-97-0559 DFL/JFM ORDER (Filed Apr. 10, 1998)

Before: FLETCHER and T.G. NELSON, Circuit Judges, and WHALEY,* District Judge.

The petition for rehearing is denied.

* Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated, Plaintiffs, v. ELOISE ANDERSON, Director of the California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; CRAIG BROWN, Director of the California Department of Finance, Defendants.	No. CIV-S-97-0529 DFL/JFM DECLARATION OF BRUCE WAGSTAFF IN OPPOSITION TO REQUEST FOR PRELIMINARY INJUNCTION Date: May 16, 1997 Time: 9:00 a.m. Courtroom 3, The Honorable David F. Levi (Original Filed Apr. 16, 1997)

DECLARATION

I, BRUCE WAGSTAFF, declare that:

1. I am Deputy Director of the Welfare Programs Division of the California Department of Social Services (CDSS). The Division administers the Aid to Families with Dependent Children (AFDC) Program and other welfare programs. Although California's AFDC Program is now being funded under the new Temporary Assistance to Needy Families (TANF) federal law, California's program continues to be called AFDC. As Deputy Directory, I am responsible for supervising the implementation of federal and state laws and formulating state regulations setting administrative policy relative to welfare benefit payments for the AFDC program. As Deputy Director, I have personal knowledge of the following and could competently testify thereto if called as a witness.

2. AFDC is California's largest welfare program. In the most recent fiscal year for which actual expenditures are available (fiscal year 1995-1996), California provided AFDC to an average of 2,645,814 persons per month, at an annual cost of $6.0 billion dollars. Of that total amount, $2.9 billion dollars in funds were derived from the California state general fund.

3. Based on information provided by the United States Department of Health and Human Services for the fiscal year 1996-1997, California has the sixth highest grant level in the United States and the highest grant level of the 10 most populous states. California accounts for 29 percent of all money spent nationwide on the AFDC program, and 20 percent of the national AFDC

caseload, though it has only 12 percent of the nation's population.

4. In a survey conducted by CDSS' Information Services Bureau in October 1995, of the then-existing AFDC caseload, approximately 9100 families resided in another State within one year of application of AFDC benefits in California.

5. California's Welfare and Institutions Code Section 11450.03, designated as the Relocation family grant, was originally enacted in 1992 by the California State Legislature as part of an overall program of welfare reform designed both to save money and to end the cycle of dependency on welfare through changes to welfare program benefit structures.

6. For the 1997-1998 fiscal year, CDSS projects that implementation of Welfare and Institutions Code Section 11450.03 will reduce total AFDC expenditures by $22.8 million dollars. Of this total reduction, California general fund expenditures will be reduced by $10.9 million dollars.

7. California's Relocation Family Grant provision is authorized by the United States Congress in Section 103, Section 404(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104-193. In addition to California, Pennsylvania and Maryland have also implemented residency-based grant provisions as part of their respective welfare reform programs. A number of other states have proposed implementing similar provisions in their TANF State Plans.

8. Under the California Family Relocation Grant provision, new residents will not be denied AFDC or other benefits. In fact, new residents in California will receive no less than the amount of aid they would have received in their state of prior residence. In addition, new residents may be eligible for supplementary benefits. For example, under current law, California pays the California Special Needs Allowance (SNA) for homeless assistance to all AFDC families who are entitled to it. Many other states do not have a SNA for homeless assistance. In California, SNA provides an eligible recipient up to $30 per day for temporary shelter and up to 160% of MAP for permanent housing. Additionally, all persons impacted by Welfare and Institutions Code Section 11450.03 are eligible for full Medicaid benefits and Food Stamps. In fact, for every three dollars an AFDC grant is reduced by operation of Welfare and Institutions Code Section 11450.03, Food Stamp benefits are increased by approximately one dollar.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on April 15, 1997, at Sacramento, California.

/s/ Bruce Wagstaff
BRUCE WAGSTAFF

DECLARATION OF SERVICE

Case Name: ROE V. ANDERSON, et al.

USDC, Eastern District of Cal. Case No.: CIV-S-97-0529 DFJ/JFM

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 16, 1997, I place the attached

DECLARATION OF BRUCE WAGSTAFF IN OPPOSITION TO REQUEST FOR PRELIMINARY INJUNCTION

in the internal mail collection system at the Office of the Attorney General, 1300 I Street, P.O. Box 944255, Sacramento, California, 94244-2550, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage fully postpaid, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on April 16, 1997, at Sacramento, California.

/s/ Diane Boggess
Diane Boggess

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DENNIS ECKHART, Supervising
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Attorneys for Defendants Eloise Anderson, the California Department of Social Services, Pete Wilson, and Craig Brown

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated, Plaintiffs, v. ELOISE ANDERSON, Director of the California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; CRAIG BROWN, Director of the California Department of Finance, Defendants.	No. CIV-S-97-0529 DFL/ JFM DECLARATION OF THEODORE GARELIS IN OPPOSITION TO REQUEST FOR PRELIMINARY INJUNCTION Date: May 16, 1997 Time: 9:00 a.m. Courtroom 3, The Honorable David F. Levi (Filed Apr. 16, 1997)

I, THEODORE GARELIS, declare:

1. I am an attorney at law admitted to practice law in the State of California and in this Court. I am employed as a Deputy Attorney General with the Office of the California Attorney General. I have been assigned to represent defendants in this matter. I have personal knowledge of the facts set forth herein, and if called upon to testify, would and could competently do so.

2. I am also assigned to represent the state defendants in *Beno v. Shalala,* CIV-S-92-2135 DFL/JFM, and in *Green v. Anderson,* CIV-S-92-2118 DFL/JFM. I am thus a custodian of records of the copies of the legal files in these actions.

3. Attached as Exhibit A hereto is a true and correct copy of the Declaration of Dennis Hordyk, dated January 14, 1993. The original of this declaration is attached to defendants' memorandum of points and authorities in opposition to preliminary injunction in *Green v. Anderson,* CIV-S-92-2118 DFL/JFM.

4. Attached as Exhibits B, C, and D are copies of documents from the administrative record lodged with this Court by the United States in *Beno v. Shalala,* CIV-S-92-2135 DFL/JFM.

5. Exhibit B is a true and correct copy of the waiver authority attached to the October 29, 1992, letter to Eloise Anderson from the United States Department of Health and Human Services, approving California's application for a demonstration project. The federal statutes and regulations referenced in the waiver authority are those waived in 1992 by the United States as part of the

approval of the demonstration project. A copy of the original is in Volume I of the administrative record lodged with this Court in *Beno v. Shalala.*

6. Exhibit C is a true and correct copy of the February 29, 1996, letter to Eloise Anderson from the United States Department of Health and Human Services, noting in relevant part that the waiver authority for the durational residency requirement was revoked by the United States Department of Health and Human Services in 1996. A copy of the original is in Volume VII of the administrative record lodged with this Court in *Beno v. Shalala.*

7. Exhibit D is a true and correct copy of the March 11, 1996, letter to Kimberly Belshé from the United States Department of Health and Human Services, noted in relevant part that the waiver of the maintenance of effort requirement was reapproved in 1996. A copy of the original is in Volume VII of the administrative record lodged with this Court in *Beno v. Shalala.*

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on April 15, 1997, at Sacramento, California.

/s/ Theodore Garelis
THEODORE GARELIS
Deputy Attorney General
Declarant

EXHIBIT A

DECLARATION OF DENNIS HORDYK

I, Dennis Hordyk, declare:

1. I am the Assistant Director of the Department of Finance. The Department has overall responsibility for compilation of the Governor's Budget for the State of California.

2. The AFDC program is funded from the state general fund revenues and federal funds, on a 50/50 match basis; the State pays 95 percent of the non-federal share of the AFDC program costs. In the 1992-93 budget, the state's General Fund revenues total approximately $40.9 billion.

3. For the fiscal year ending June 30, 1993, the Department of Finance is projecting a $2.1 billion *deficit* in the state's general fund. The budget deficit is so severe that the *state will have no reserve* available to cover the costs of unforeseen events.

4. The current 1993-94 budget plan resolves the $2.1 billion 1992-93 deficit during the 1993-94 fiscal year. The Department of Finance is projecting that revenues will actually decline by over $1 billion from 1992-93. This will be the second year of revenue declines as revenues declined from 1991-92 to 1992-93 by approximately $1.1 billion. This is a result of continuing poor performance in the economy. These revenue declines will require reductions to the 1993-94 fiscal year budget plan beyond those already taken in the 1992-93 budget and the current 1993-94 budget plan.

5. I understand the U.S. District Court has temporarily restrained implementation of Welfare and Institutions Code section 11450.03, as enacted by Chapter 722 of the Statutes of 1992. Failure to implement Section 11450.03 would result in additional, unbudgeted state General Fund costs in the AFDC program of $8.4 million in fiscal year 1992-93, and $22.5 million in fiscal year 1993-94.

6. There are no funds appropriated by the 1992-93 state budget to pay for this increase in expenditures in the AFDC program.

7. As indicated above, there are simply no available state general fund revenues to fund a supplemental or deficiency appropriation to meet this additional expense.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 14, 1993, at Sacramento, California.

/s/ Dennis Hordyk
DENNIS HORDYK

EXHIBIT B

DEPARTMENT OF HEALTH AND HUMAN SERVICES
ADMINISTRATION FOR CHILDREN AND FAMILIES
OFFICE OF FAMILY ASSISTANCE
WAIVER AUTHORITY

STATE: California

Waivers of the following provisions of the Social Security Act are provided for the purposes of implementing the Assistance Payments Demonstration Project:

Statewideness

402(a)(1) and various provisions of the regulations at 45 CFR 205.120(a) and 233.10(a)(1)(iv) – to allow the State to conduct the demonstration Statewide but to exclude control group cases from having various demonstration rules applied to them.

Thirty and One-Third Earnings Disregard

402(a) (8) (B) (ii) and various provisions of the regulations at 45 CFR 233.20(a) (11) (i) (D) and (ii) (B) – to allow the State to continue the $30 and one-third earned income disregard without regard to the 12-month and 4-month limitations.

100-Hour Rule

402(a) (41) and provisions of the regulations at 45 CFR 233.100(a) (1) (i) and (c) (1) (iii) – to allow the State to continue to provide AFDC benefits to unemployed parent recipient families in which the principal earner works 100

or more hours per month so long as the family meets all other rules for continuing eligibility.

California Relocation Grant

402(a) and various provisions of the regulations at 45 CFR 233.20(a) (1) and (2) – to allow the State to implement a different method for determining the amount of assistance for those families in the treatment group who have not resided in the State continuously for at least 12 months immediately prior to application. The different method provides an AFDC grant amount equal to the lesser of the amount of aid computed using California's grant computation or the maximum aid payment, not counting special needs, of the State of origin, as determined semi-annually by the State of California.

Cost-of-Living Adjustments

402(a) and various provisions of the regulations at 45 CFR 233.20(a) (1) and (2) – to allow the State to provide cost-of-living adjustments in the MAP and the MBSAC to the treatment group and not to the control group.

The following activity does not require waiver of provisions of the Social Security Act because the State will implement it through a State Plan amendment: Reducing the maximum aid payment (MAP) for all AFDC cases to 94.2 percent of the September 30, 1992, level.

The State may further reduce MAPs from 94.2 percent of the September 30, 1992, level for all AFDC cases by up to five percent based on a statutory change. The effective date of the change may be no earlier than the first day of

the quarter in which the State submits an approvable State plan amendment which specifies the amount of the reduction. Action will be taken by the Department on the amendment pursuant to 45 CFR Part 201.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
HEALTH CARE FINANCING ADMINISTRATION

WAIVER AUTHORITY

STATE: California

Waivers of the following provisions of the Social Security Act are provided:

1902(c) (1) – Maintenance of Effort. To permit the State to obtain approvals of new State plans for medical assistance even though the AFDC payment levels under WRDP will be below those levels in effect on May 1, 1988.

Under authority of section 1115(a) (2) of the Social Security Act, expenditures (which would otherwise not be regarded as expenditures under section 1903) shall for the duration of the demonstration be regarded as expenditures under the State's title XIX plan.

- Expenditures to permit the State to maintain the eligibility level for its Medically/Needy program at the levels in effect June 30, 1991, after the State reduces payments under APDP as designated under section 1903(f)(1).

EXHIBIT C

[LOGO] DEPARTMENT OF HEALTH & HUMAN SERVICES

ADMINISTRATION FOR CHILDREN AND FAMILIES
Office of the Assistant Secretary, Suite 600
370 L'Enfant Promenade, S.W.
Washington, D.C. 20447

February 29, 1996

Ms. Eloise Anderson
Director
California Department of Social Services
744 P Street
Sacramento, California 95814

Dear Ms. Anderson:

I am pleased to inform you that your application for waivers under section 1115 of the Social Security Act to amend the "Assistance Payments Demonstration Project" (APDP) is approved upon written acceptance of the enclosed Amendments to Waiver Terms and Conditions. The amendments to the demonstration will be effective beginning on the first day of the month following 50 days from the date the State accepts the Amendments to Waiver Terms and Conditions and will remain in effect until the end of the demonstration period specified in the project's Waiver Terms and Conditions.

The title IV-A waivers necessary to implement the demonstration are identified on the enclosed listing. A separate letter approving a waiver of section 1902(c)(1) of the Social Security Act will be forthcoming from the Health Care Financing Administration. In order to implement these terms and conditions, you should submit a title IV-

A AFDC State Plan amendment indicating the date that the proposed 2.3 percent reduction in payment levels will be implemented. Prior Plan amendments for a 1.3 percent reduction, implemented December 1, 1992, and a 2.7 percent reduction, implemented September 1, 1993, have previously been approved.

The Administration believes that the Federal Government must give states the flexibility to design new approaches to their local problems, provided that these proposals meet Federal standards. We believe California's demonstration will add to the information base for new policy directions for welfare reform.

If you have any questions regarding this approval, please contact Mr. Peter Germanis, the Federal Project Officer for this project. His address is: Administration for Children and Families, Office of Family Assistance, 370 L'Enfant Promenade, S.W., Washington, D.C. 20447; telephone (202) 401-9316.

I commend you and staff of the California Department of Social Services for seeking alternatives to improve the public assistance system and to assist families in becoming self-sufficient. I look forward to continuing to work with you and your agency on this important initiative.

Sincerely,

/s/ Mary Jo Bane
Mary Jo Bane
Assistant Secretary
for Children and Families

Enclosures

cc: Sharon Fujii
ACF Regional Administrator

February 1996

AMENDMENT TO WAIVER TERMS AND CONDITIONS FOR THE CALIFORNIA ASSISTANCE PAYMENTS DEMONSTRATION PROJECT

In the October 1992 Waiver Terms and Conditions for APDP, delete the third bullet under "AFDC" in 2.2 and add the following language to 2.3, beginning a new paragraph under the existing text:

> "These MAP reductions will not apply to any family in which all parents or caretaker relatives of the eligible child(ren) living in the home
>
> - receive benefits under the Supplemental Security Income/State Supplementary Program, In-Home Supportive Services (IHSS), Workers' Compensation Temporary Disability Insurance (TDI), or State Disability Insurance (SDI);
> - are non-needy non-parent caretaker relatives;
> - have been determined by the Department of Social Services, either in the course of the AFDC eligibility or JOBS exemption process or in response to a request from the individual for such a determination, to be incapacitated for employment; or
> - are high school students under the age of 19.
>
> A family that is not subject to the MAP reductions will receive the MAP that was in effect for that size family in August 1992."

DEPARTMENT OF HEALTH AND HUMAN SERVICES
ADMINISTRATION FOR CHILDREN AND FAMILIES

OFFICE OF FAMILY ASSISTANCE

Amendments to Waiver Authority

The Waiver Authority issued by the Administration for Children and Families in October 1992 for the purposes of implementing the Assistance Payments Demonstration Project are amended as follows:

- In the *"Statewideness"* waiver, add the following language immediately before the period:

  "and to exclude from the MAP reductions those cases specified in 2.3 of the Waiver Terms and Conditions"

- Delete the heading *"California Relocation Grant"* and the entire paragraph under that heading.

EXHIBIT D

[logo]
DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration

7500 SECURITY BOULEVARD
BALTIMORE MD 21244-1850

MAR 11 1996

Ms. Kimberly Belshe
Director
California Department of Health Services
714 P Street
Sacramento, California 95814

Dear Ms. Belshe:

As indicated in the award letter dated February 29 that the State received from the Administration for Children and Families (ACF), the Health Care Financing Administration (HCFA) has approved your application for a waiver to amend the welfare reform demonstration entitled "California Assistance Payment Demonstration Project" (APDP).

A waiver of the following provision of the Social Security Act is provided:

- Section 1902(c)(1) – Maintenance of Effort

  To permit the State to obtain approvals of new State plans for medical assistance even though the AFDC payment levels under APDP will be below those levels in effect on May 1, 1988.

The waiver will be effective beginning on the first day of the month following 50 days from the date the State

accepts the Amendments to Waiver Terms and Conditions. It will remain in effect until the end of the demonstration period specified in the project's current Waiver Terms and Conditions (i.e., through March 31, 1999). The project number for APDP will remain 11-W-00018/9.

Enclosed are:

> The HCFA waiver for this project (Enclosure I). The updated waiver list includes Costs Not Otherwise Matchable authority previously granted.
>
> The terms and conditions that define the nature, character, and extent of anticipated HCFA involvement in the project (Enclosure 2). These are in addition to the interagency terms and conditions you have received from ACF for this project.

Enclosure 1

DEPARTMENT OF HEALTH AND HUMAN SERVICES
HEALTH CARE FINANCING ADMINISTRATION

Waiver and Costs Not Otherwise Matchable for California Welfare Reform Demonstration

Waiver

The following waiver is granted to the State:

1902(c)(1) regarding Maintenance of Effort, to permit the State to obtain approvals of new State plans for medical

assistance even though the AFDC payment levels under APDP will be below those levels in effect on May 1, 1988.

Costs Not Otherwise Matchable

Under the authority of section 1115(a)(2) of the Social Security Act (the Act) the following expenditures made by the State for the costs identified below (which may not otherwise be included as State expenditures under section 1903) shall, for the duration of the project, be regarded as expenditures under the State's title XIX plan:

> Expenditures to permit the State to maintain the eligibility level for its Medically Needy program at 133 1/3 percent of the AFDC payment level in effect on November 30, 1992, as specified under section 1903(f)(1), while the State reduces payments under the demonstration.

This award is subject to our receiving your written acceptance of the HCFA terms and conditions within 30 days of the date of this letter.

Your HCFA project officer is Joan Peterson, who can be reached at (410) 786-0621. Your project officer is available to answer any Medicaid-related questions concerning the scope and implementation of the project described in the interagency terms and conditions.

Communications regarding program matters should be submitted to the project officer at the following address: Office of State Health Reform Demonstrations, Office of Research and Demonstrations, Health Care Financing Administration, Mail Stop C-3-18-26, 7500 Security Boulevard, Baltimore, Maryland 21244-1850.

Official correspondence concerning the project, including quarterly reports, should be submitted to Joanna Bandzwolek, Financial, Administrative and Procurement Staff, Office of Research and Demonstrations, Health Care Financing Administration, Mail Stop C-3-11-17, 7500 Security Boulevard, Baltimore, Maryland 21244-1850. She may be contacted for additional administrative matters at (410) 786-6643.

We extend our congratulations on this award and look forward to continuing to work with you during the course of the project.

Sincerely,

/s/ Barbara S. Cooper
Barbara S. Cooper
Acting Director
Office of Research
and Demonstrations

Enclosures

Enclosure 2

HEALTH CARE FINANCING ADMINISTRATION

SPECIAL TERMS AND CONDITIONS

NUMBER: 11-W-00018/9

TITLE: California Assistance Payments Demonstration Project

AWARDEE: California Department of Social Services

1. The awardee will submit to HCFA all deliverables indicated in the joint terms and conditions. Reports may be submitted according to the schedule prescribed by ACF.

2. HCFA may suspend or terminate the project, in whole or in part, at any time before the date of expiration, whenever it determines that the awardee has materially failed to comply with the terms of the project award. HCFA will promptly notify the awardee in writing of the determination and the reasons for the suspension or termination, together with the effective date.

3. HCFA reserves the right to withdraw waivers at any time, if it determines that continuing the waivers would no longer be in the public interest. If a waiver is withdrawn, HCFA will be liable for only normal close-out costs.

DECLARATION OF SERVICE

Case Name: **ROE v. ANDERSON, et al.**

USDC, Eastern District of Cal. Case No.: CIV-S-97-0529 DFJ/JFM

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On *April 16, 1997*, I placed the attached

DECLARATION OF THEODORE GARELIS IN OPPOSITION TO REQUEST FOR PRELIMINARY INJUNCTION

in the internal mail collection system at the Office of the Attorney General, 1300 I Street, P.O. Box 944255, Sacramento, California, 94244-2550, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage fully postpaid, addressed as follows:

Mark D. Rosenbaum
David S. Schwartz
Silvia R. Argueta
ACLU Foundation of Southern California
1616 Beverly Blvd.
Los Angeles, CA 90026

Martha F. Davis
Sherry Leiwant
Andrea D. Williams
NOW Legal Defense and Education Fund
99 Hudson Street, 12th Floor
New York, NY 10013

Jordan C. Budd
ACLU Foundation of San Diego & Imperial Counties
P.O. Box 87131
San Diego, CA 92138

Alan L. Schlosser
ACLU Foundation of Northern California
1663 Mission Street, Suite 400
San Francisco, CA 94105

Edmund F. Brennan
Assistant U.S. Attorney
650 Capital Mall
Sacramento, CA 95814

Shiela M. Leiber
Dan Bensing
Attorneys, Department of Justice
901 "E" Street, N.W.
Room 842
Washington, D.C. 20530

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on April 16, 1997, at Sacramento, California.

/s/ Diane Boggess
Diane Boggess